SUPREME COURT, U. S.

MAY 15 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 120

FRANK R. FRANKO,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

EUGENE GRESSMAN
1730 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

May 15, 1969

THE CASILLAS PRESS, INC. — 1717 K Street N. W. — Washington, D. C. — 223-1120

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	18
APPENDIX A (Order of December 8, 1968)	1a
APPENDIX B (findings and recommendation of Board of Commissioners)	2a
APPENDIX C (order of May 1, 1968)	7a

CITATIONS

Cases:

Ashe v. Swenson, No. 1099, Oct. Term 1968	17
Baldwin v. American Surety Co., 287 U.S. 156	16
Burgess v. Salmon, 97 U.S. 381	18
Cichos v. Indiana, 385 U.S. 76	16

Page

Cummings v. Missouri,
4 Wall. 277. 17

Franko v. Mahoning County Bar Association,
358 U.S. 932 3

Garland, Ex parte,
4 Wall. 333 15

Hoag v. New Jersey,
356 U.S. 464 . . . . . 16, 17

North Carolina v. Pearce,
No. 413, Oct. Term 1968 17

Ruffalo, In re,
390 U.S. 544 . . . . . 2, 7, 8, 11, 12, 13, 14, 15

St. Louis, I.M. & S.R. Co. v. Starbird,
243 U.S. 529 13

Simpson v. Rice,
No. 418, Oct. Term 1968 17

Spevack v. Klein,
385 U.S. 511 16

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381. 16

Miscellaneous:

Schroeder, *Lawyer Discipline: The Ohio Story*
(Ohio Legal Center Institute, 1967). 14, 15

IN THE

Supreme Court of the United States

October Term, 1968

No.

FRANK R. FRANKO,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this case on December 18, 1968.

OPINION BELOW

No opinion was rendered by the Supreme Court of Ohio. Its order of December 18, 1968, overruling the petition to vacate its prior orders of May, 28, 1958, and May 1, 1968, is reprinted as Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 18, 1968, and a petition for new trial and reconsideration was dismissed on April 23, 1969, on motion of the respondent. On March 6, 1968, Mr. Justice Stewart signed an order extending the time for filing this petition for writ of certiorari to and including May 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, under the Due Process Clause of the Fourteenth Amendment as interpreted and applied in *In re Ruffalo,* 390 U.S. 544, a state court is obligated to vacate a prior disbarment order and to reconsider charges of misconduct by a state judge where one of the charges of misconduct was added during the disciplinary proceedings without prior notice to the judge under investigation.

2. Whether, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, a state judge may be charged with misconduct and disbarred under new court rules applied retroactively, following a prior judicial clearance based on the same charges considered under rules in effect at the time of the alleged misconduct.

3. Whether, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, an elected state judge, charged with misconduct in his judicial duties, may

be singled out and suspended from the practice of law, in disregard of the procedures and penalties provided in state constitutional and statutory provisions relative to the forfeiture of elected public office for alleged misconduct in office.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> "No State shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

More than ten years ago, this Court had before it a petition for certiorari seeking review of the judgment of the Supreme Court of Ohio, dated May 28, 1958, indefinitely suspending the petitioner from the practice of law in Ohio. See 168 Ohio St. 17, 151 N.E. 2d 17. The sole question raised in that petition was whether the Due Process Clause of the Fourteenth Amendment outlawed the Ohio disbarment or suspension procedure whereby the critical findings of fact and recommendations were made by those who had not heard the conflicting testimony of witnesses.[1] This Court denied the petition for certiorari on January 12, 1959. *Franko v. Mahoning County Bar Association*, 358 U.S. 932, No. 475, Oct. Term 1958.

---

[1] As phrased in the petition for certiorari, p. 2, the question presented was:

> "Whether the due process clause of the Fourteenth Amendment of the Constitution of the United States outlaws a rule of practice, adopted by a state supreme court for use in state disbarment proceedings, whereby the tribunal that ultimately decides all factual issues and

In the decade following this Court's refusal to review the suspension order the petitioner has of course refrained from any form of the practice of law in Ohio. He has engaged in other pursuits, none of which has given rise to any question or complaint.

In October of 1966 the petitioner filed in the Supreme Court of Ohio (1) a petition to vacate the suspension order of May 28, 1958, and (2) an application for readmission to the Ohio bar pursuant to Paragraph (26) of Rule XXVII of the Supreme Court of Ohio. The primary federal constitutional claim raised by those papers related to the alleged invalidity, under the Fourteenth Amendment, of the original suspension proceedings brought pursuant to the then new Rule XXVII of the Supreme Court of Ohio.[2] It was there asserted, without subsequent contradiction, that the specific acts of alleged misconduct involved in the suspension proceedings all occurred prior to January 1, 1957 -- the date of the adoption by the Supreme Court of Ohio of its Rule XXVII, which established new procedures for processing disciplinary charges.[3] In addition to complaining of the retroactive application of this new Rule

---

[1] (cont'd) imposes the appropriate penalty is deprived, in a case where facts are in dispute and credibility of witnesses is decisive, of the findings of fact and recommendations of those who actually heard the conflicting testimony of the witnesses and who formed impressions as to the credibility and weight to be attached to that testimony."

[2] At page 17 of the petition to vacate the suspension order it was asserted that the institution of those suspension proceedings violated petitioner's "privileges, immunities and rights under the Fourteenth Amendment of the United States Constitution."

[3] Rule XXVII established a new and comprehensive procedure for dealing with disciplinary matters. A Board of Commissioners on Grievances and Discipline was created to make findings and

(cont'd)

XXVII, the petitioner asserted, again without subsequent contradiction, that these same acts of alleged misconduct had been the subject of prior judicial consideration in 1956 in accordance with disciplinary procedures in effect prior to the adoption of Rule XXVII. The judges of the Common Pleas Court of Mahoning County, after full consideration of these charges, had summarily and finally rejected the claims of misconduct on December 13, 1956. Thus the institution of the second proceeding under the new Rule XXVII, following such a judicial acquittal, was said to constitute a form of double jeopardy in violation of petitioner's Fourteenth Amendment rights.

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, in response to petitioner's application for reinstatement to the practice of law, ordered that a public hearing be had before a hearing panel to "take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission." The Board further ordered that, since it was "without jurisdiction or authority to 'vacate any order' of the Supreme Court of Ohio, as requested in the Petition for Reinstatement, no evidence bearing on this question will be taken or reported by the Hearing Panel." See Appendix B hereto.

Thereafter, on February 10, 1967, a hearing before the panel took place, at which petitioner represented

---

[3] (cont'd) recommendations to the Supreme Court of Ohio; hearings were to be held by a three-man panel of the 17-man Board, but the findings and recommendations to the Supreme Court were those of the entire Board. See petition in No. 475, Oct. Term 1958, pages 5-10.

himself and appeared as the only witness in support of, or opposed to, his petition for reinstatement. The petitioner testified that most of his activities as a judge which had led to the charges of misconduct were justifiable in light of some recent studies and articles and that he had been the victim of unwarranted criticism by the local press. He also filed an extensive brief on his own behalf; no opposing brief or testimony was offered.

Following the hearing before the panel and a consideration of the matter by the entire Board of Commissioners, the Board on December 1, 1967, filed its findings of fact and recommendation that the petition for reinstatement be denied. See Appendix B hereto. The pertinent portions of those findings were:

(1) The petitioner had made no reference in his testimony or brief "to his present convictions, or to any change of mind, about any of the activities for which the Supreme Court of Ohio had criticized him at the time he was indefinitely suspended."

(2) Much of petitioner's brief was "directed to the claim that the original hearing was void for lack of jurisdiction" and relied upon matters in the original transcript of the suspension proceedings that was not now in evidence before the Board.

(3) The petitioner had made no reference in his for reinstatement, the evidence and the supporting brief "do not establish by clear and convincing evidence that he has rehabilitated himself since his suspension and that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and do not establish that he is now a proper person to be readmitted to the Bar of Ohio."

Following receipt of these findings and recommendations by the Board, the petitioner filed objections thereto in the Supreme Court of Ohio, reiterating *inter alia* that the retroactive application of Rule XXVII so as to effectuate the original suspension was in violation of petitioner's Fourteenth Amendment rights. These objections were expanded upon in an accompanying brief. On May 1, 1968, without hearing any oral argument on the matter, the Supreme Court of Ohio, acting "on certified report by the Board of Commissioners on Grievances and Discipline," ordered that the petitioner's application for reinstatement "be, and the same hereby is, denied." See Appendix C hereto. No opinion was rendered and no reference was made in the order or otherwise to the petitioner's federal constitutional claim concerning the retroactive application of Rule XXVII.

Then on October 11, 1968, the petitioner filed in the Supreme Court of Ohio a new petition to vacate the original suspension order, as well as the order of May 1, 1968, denying reinstatement to the bar. This petition (p. 5) reiterated the contention that the retroactive application of Rule XXVII, particularly in view of petitioner's exoneration under prior procedures, was violative of Fourteenth Amendment guarantees. This petition (pp. 21-22) also asserted, for the first time in the entire proceedings, the following:

> "The Respondent now states to this Court that on April 8, 1968, the Supreme Court of the United States rendered its decision in *In re Ruffalo*, 390 U.S. 544, a decision which was not available to Respondent at the time of filing his application for reinstatement. That decision is directly in point in this case and dictates that the original disbarment of the Respondent be set aside as violative of the due process of law

guarantees of the Fourteenth Amendment to the United States Constitution. More specifically, the addition of a fourth charge of misconduct (the George Chappel Incident and the Judicial Canon 21) during the course of the original hearings before three-man panel of Commissioners, an addition made over Respondent's vigorous objections (R. 261-270), was in plain violation of the Ruffalo rule that, since the Respondent had no notice that the Chappel incident would be considered a disbarment offense until after the hearing began and testimony was taken, this 'absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.' 390 U.S. at 552.

"In fact the truth of the matter relative to this incident and this charge based on the offense of Judicial Canon 21 rested in the mind of the Trustees' chief witness, Ray Casanta, once Respondent's bailiff, about whom the incident rightly belonged and not about a traffic case or publicity. The facts of the incident involved the attempted firing of Ray Casanta by one of the municipal judges by means of a Western Union telegram, well within the knowledge of the Trustees' attorneys. The Hearing Panel permitted testimony to be taken from Respondent; the full Board remained silent on the testimony but this Court, in its decision, picked it up as one of the two offenses against Respondent for his discipline."

This contention, grounded on the recent decision of this Court in *In re Ruffalo*, 390 U.S. 544, reflected the

objections made at the original suspension hearings in 1957 by the petitioner to the additional charge of misconduct injected into the proceeding after it was underway before the hearing panel. The charges as to which petitioner had notice and an opportunity to prepare defenses prior to the hearings were three in number: (1) the charge that as a Municipal Court judge the petitioner had refused to follow the mandate of an Ohio statute in his practice of not noting minor traffic violations on the reverse side of licenses of drivers convicted of such violations; (2) the charge that the petitioner did not resign his judicial office when he became an independent candidate for the office of prosecuting attorney of Mahoning County in 1956 and that he used the prestige of his judicial position to promote his candidacy, in violation of Canons of Ethics, No. 30; and (3) the charge that he nullified and voided parking violation charges involving the parking of his own automobile during the course of his 1956 campaign for the office of prosecutor.

As previously indicated, all of these incidents involved in the charges occurred in 1956, prior to the adoption of Rule XXVII by the Supreme Court of Ohio under which the petitioner was tried in 1957. And during the course of the hearings and without prior notice to the petitioner, the respondent charging party was allowed to amend the complaint to include the so-called Chappel incident, also occurring in 1956. See original transcript, pages 243-244. It was charged that, as judge, the petitioner had issued a subpoena to a police sergeant in a particular traffic case, involving one George Chappel, to appear as a witness; the police sergeant was under public criticism for his prolonged absence from the city and it was alleged that petitioner, knowing full well of that absence, issued the subpoena merely to obtain publicity for himself in his campaign for prosecutor.

Petitioner's counsel immediately objected to the addition of this new charge. He stated that "we were not prepared, as a matter of fact, to meet any evidence on that particular charge, because we did not anticipate it . . . If what they say is true [that the second count, alleging a violation of No. 30 of the Canon of Ethics, can be construed to cover this Chappel incident], then it would have meant that under this general language Judge Franko should have been prepared to proceed or to offer evidence on any of the 10,000 cases we have testimony that he heard since he was in office. And I think he is entitled to a clear specification in a charge of that nature so that he can be prepared to meet the evidence. But as it stands now, he was not prepared and he was taken by surprise on the part of the Bar Association in raising that matter in this proceeding." Transcript, pages 245-246.

Nevertheless, evidence was taken on the Chappel incident. But no mention was made of the incident in the subsequent findings and recommendation of the full Board of Commissioners. The Supreme Court of Ohio, however, dwelt at length on the evidence relating to the Chappel incident and concluded "that the facts regarding this episode disclose a judge more interested in obtaining personal publicity at the expense of someone else's reputation, by capitalizing on a newsworthy issue, than one truly interested in the efficient dispensing of justice." See 151 N.E. 2d at 29. The Chappel incident thus played an obviously significant part in the determination to suspend petitioner indefinitely from the practice of law.

It should also be noted that the petitioner, in seeking a rehearing in 1958 of the suspension by the Supreme Court of Ohio, renewed his contention concerning the Chappel incident, particularly in light of the failure of

the Board of Commissioners to make findings thereon. Objection was also made in the rehearing petition to the *ex post facto* application of Rule XXVII to events occurring prior to the adoption of that rule, citing Art. I, Sec. 10, of the Federal Constitution. The rehearing petition was denied without comment. In the subsequent petition for certiorari filed in this Court, No. 475, Oct. Term, 1958, petitioner in his statement of the case detailed the course of events surrounding the belated injection of the Chappel incident (pages 6, 10-11). But no claim was there made that the insertion of that charge violated petitioner's Fourteenth Amendment due process rights, the *Ruffalo* doctrine then being some ten years in the future.

Despite the clear raising of the federal constitutional defect implicit in the addition of the Chappel charge, the Supreme Court of Ohio overruled without comment the 1968 petition to vacate the original suspension order and the May 1, 1968, order. And it thereby overruled the additional federal constitutional claim that the procedural rules under which petitioner had been disbarred had been applied retroactively and without regard to the prior clearance of petitioner on the same charges under earlier rules then in effect. The Supreme Court's order merely stated that "upon consideration" the petition to vacate the prior orders was overruled; the caption of the order also indicated that the matter was considered to be before the court "on certified report by the Board of Commissioners on Grievances and Discipline" – a report which was in no way responsive to any constitutional or jurisdictional objection to the original proceedings. See Appendix A hereto.

Also overruled by the Ohio Supreme Court's order of December 18, 1968, was the additional federal constitutional claim raised by the petition before it (page 15)

that "his right to due process of the law was denied him in the forfeiture of elective office because the mode of procedure under this Ohio Supreme Court's 1957 Rules applied retroactively to his acts and conducts and disturbed his possessed and accrued vested substantive rights and that thereby he was deprived of his judgeship and its emoluments through a process never previously or thence applied to any other elected judge or public office holder in the State of Ohio." This claim had reference to numerous constitutional and statutory provisions of the State of Ohio respecting the removal and impeachment of judges and other elected public officers for misconduct in office, none of which was invoked against petitioner in his capacity as a judge elected for a term running from 1954 to 1960. See Ohio Constitution, Art. II, Secs. 23, 24 and 38; Ohio Rev. Code §§3.07, 3.08. Never before, or since, claimed petitioner, had the procedures leading to the sanction of indefinite suspension from the practice of law been imposed on an elected judicial officer accused of judicial misconduct.

REASONS FOR GRANTING THE WRIT

1. The refusal of the court below to reconsider its prior orders conflicts with the principles established by this Court in *In re Ruffalo*, 390 U.S. 544.

As was said by petitioner in his petition to this Court in 1958 (No. 475; Oct. Term, 1958, p. 11), "It is concededly not the function of this Court to sit in judgment on the merits of petitioner's ouster from the bar of Ohio." Nor is it the function of this Court to review the merits of petitioner's attempt to be reinstated to that bar. But it is the function of this Court, as Rule 19(1)(a) makes plain, to review the action of a state court in deciding a federal question of substance

"in a way probably not in accord with applicable decisions of this court." That is precisely the basis for reviewing the judgment of the Supreme Court of Ohio, entered in this proceeding on December 18, 1968.

That judgment declined to vacate the prior orders that had (1) suspended petitioner from the practice of law in Ohio and (2) refused to readmit petitioner to the Ohio bar. And the court's refusal to vacate such orders and reconsider them was done in knowing disregard of this Court's recent decision in *In re Ruffalo*, 390 U.S. 544.[4]

The decision in *Ruffalo* is precisely in point and should have dictated a reconsideration of the prior adverse orders entered by the Supreme Court of Ohio in this case. In *Ruffalo*, as in this case, an additional charge was added during the course of an Ohio disbarment proceeding without prior notice or warning to the petitioner, and the ultimate disbarment order of the Supreme Court of Ohio relied in large part upon the evidence taken with respect to this belated charge. Such a procedure was held by this Court to be wanting in due process since, in a disbarment proceeding, a lawyer is "entitled to procedural due process, which includes fair notice of the charge" and "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence." 390 U.S. at 550.

---

[4] It is elementary, of course, that a state court's refusal to pass upon a properly and clearly raised federal question is just as reviewable as an express decision on the point. Where, as here, the state court necessarily denied the federal claim in denying relief, the judgment is subject to this Court's jurisdiction. See, e.g., *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U.S. 529, 601.

Ruffalo differs from the instant case only in that the Court was there concerned with whether a federal appellate court was justified in ordering disbarment in reliance upon the prior Ohio disbarment which was so patently lacking in due process. That difference, however, is not material. Here we have a direct challenge to the constitutional validity of the same procedure followed by the Ohio court. The Ohio procedure outlawed by *Ruffalo* is no less defective when considered in the context of an effort to vacate an Ohio disbarment order or an order refusing readmission. Were the Supreme Court of Ohio to give appropriate heed to the *Ruffalo* decision, it might well vacate those orders and at least order a new proceeding in which petitioner was accorded the due process which *Ruffalo* has determined is his due.

The appropriateness of review by this Court is heightened by the fact that the Ohio disbarment procedure here involved, a procedure already condemned in the *Ruffalo* case, can be repeated in Ohio disbarment cases unless this Court speaks directly to the Supreme Court of Ohio. Since the inception of Rule XXVII by that court on January 1, 1957, and through November of 1966, some 115 disciplinary proceedings have been instituted in Ohio.[5] It is impossible to tell how many have involved the unconstitutional feature present here and in the *Ruffalo* case. But the claim has been made, in an authoritative study of Ohio disbarment cases arising under Rule XXVII, that the fact that this Court has denied review of 12 disciplinary cases arising in Ohio demonstrates that "Lawyer discipline appears under

---

[5] Schroeder, *Lawyer Discipline: The Ohio Story* (Ohio Legal Center Institute, 1967) 24-95.

the Ohio procedures to be exclusively within the state jurisdiction without federal constitutional involvements."[6]

Such a claim is impermissible. As the *Ruffalo* case demonstrates, the Ohio disbarment procedures are as subject to "federal constitutional involvements" as the procedures of any other State or the procedures involving other professions or interests. It is time that Ohio be reminded of the relevance of the Due Process Clause of the Fourteenth Amendment to state disciplinary proceedings involving lawyers and judges.[7]

2. The discipline imposed on petitioner on a retroactive procedural basis, following clearance on the same charges under procedures then in effect, raises important problems under the Fourteenth Amendment.

This Court further made it clear in the *Ruffalo* case, 390 U.S. at 550-551, that disbarment "is a punishment or penalty imposed on a lawyer" and that disbarment proceedings "are adversary proceedings of a quasi-criminal nature." See also *Ex parte Garland*, 4 Wall. 333, 380;

---

[6] "Even more important is the simple fact that in 12 cases writs of certiorari were filed in the U.S. Supreme Court to review the Ohio Supreme Court disciplinary determination. Without exception every writ was denied, and in 4 cases the further petitions for rehearing were denied. Lawyer discipline appears under the Ohio procedures to be exclusively within the state jurisdiction without federal constitutional involvements." Schroeder, *Lawyer Discipline: The Ohio Story* (Ohio Legal Center Institute, 1967) 97.

[7] There is presently pending before the Supreme Court of Ohio a petition filed by the petitioner in the *Ruffalo* case, seeking to vacate the judgment of indefinite suspension. That petition asserts that this Court's *Ruffalo* decision demonstrates the invalidity of the state proceeding that led to the suspension.

Speyack v. Klein, 385 U.S. 511, 515. Thus viewing the instant case in its quasi-criminal posture, there are raised several significant problems under the Fourteenth Amendment meriting the attention of this Court:

(1) The undisputed fact that the petitioner had been acquitted in 1956 by the Common Pleas Court of Mahoning County of the same three charges made against him in 1957 under the subsequently promulgated Rule XXVII raises anew the problem whether the Fifth Amendment's prohibition against placing the accused in double jeopardy is applicable to state court prosecutions under the Due Process Clause of the Fourteenth Amendment.

That basic issue was raised but not decided by this Court in *Cichos v. Indiana*, 385 U.S. 76 (writ dismissed as improvidently granted). The importance of the question is obvious and the need for its resolution by this Court continues unabated. And the instant case presents the additional important question whether, if the the double jeopardy provision is to be incorporated in the Fourteenth Amendment, the double jeopardy proscription should be held applicable to a quasi-criminal disbarment proceeding.

(2) The prior action of the Common Pleas Court acquitting the petitioner raises the further question whether the subsequent action of the Supreme Court of Ohio was barred under the Due Process Clause of the Fourteenth Amendment by virtue of collateral estoppel doctrines, and the related concepts of res judicata and election of remedies. See *Baldwin v. American Surety Co.*, 287 U.S. 156; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381. In *Hoag v. New Jersey*, 356 U.S. 464, 471, this Court stated that it entertained "grave doubts whether collateral estoppel can be regarded as a constitutional requirement." But there is presently

pending before the Court, awaiting argument, a case which calls into question the continuing vitality of the *Hoag* case and raises again the applicability of collateral estoppel doctrines to state prosecutions. *Ashe v. Swenson*, No. 1099, Oct. Term 1968 (certiorari granted, March 3, 1969). While the instant case has the added feature of the applicability of collateral estoppel doctrines to a quasi-criminal proceeding, it may be appropriate to await the outcome of the *Ashe* case and to assess this petition in light of that outcome; or it may be appropriate to permit this case to be heard and argued along with the *Ashe* case. See also *North Carolina v. Pearce*, No. 413, Oct. Term 1968, and *Simpson v. Rice*, No. 418, Oct. Term 1968, both of which have been argued and, as of May 1969, are awaiting decision by this Court.

It is obviously important to the States and to those lawyers and judges accused of improprieties to know how many times, under the Due Process Clause of the Fourteenth Amendment, such individuals may be charged and tried for the same disbarment offenses. As the numbers of such proceedings increase, and as the vigilance of enforcing canons of ethics is tightened, this problem is most deserving of consideration and resolution by this Court.

(3) Closely connected with the foregoing problems is the validity, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, of the application of Rule XXVII procedures to the petitioner on a retroactive basis. The alleged indiscretions all occurred prior to the adoption of that rule. To apply such a quasi-criminal procedure to the petitioner on a retroactive basis and without regard to his prior acquittal of the same charges raises most serious problems of discrimination and unfairness under those Clauses. See *Cummings*

v. Missouri, 4 Wall. 277; *Burgess v. Salmon*, 97 U.S. 381, both holding that a person cannot be punished for the violation of a statute which was not in force at the time the act in question was done.

(4) A final constitutional problem raised by the order below stems from the necessary denial of the claim that petitioner, the only elected state judge ever singled out for disbarment sanctions, was thereby denied his rights under the Due Process and Equal Protection Clauses. This is a novel but important constitutional claim that deserves consideration by this Court. Can a state court ignore the established constitutional and statutory processes for removing or otherwise imposing sanctions on elected judges and other public officers on charges of misconduct in office? Can a particular elected judge be singled out from all other judges and public officials and given the different sanction of disbarment or indefinite suspension from the practice of law on such charges of misconduct in office? Can such an irrational and discriminatory classification of elected judges or other public officers be permitted in light of the Equal Protection Clause?

Those are serious questions under the Fourteenth Amendment that deserve answers by this Court.

CONCLUSION

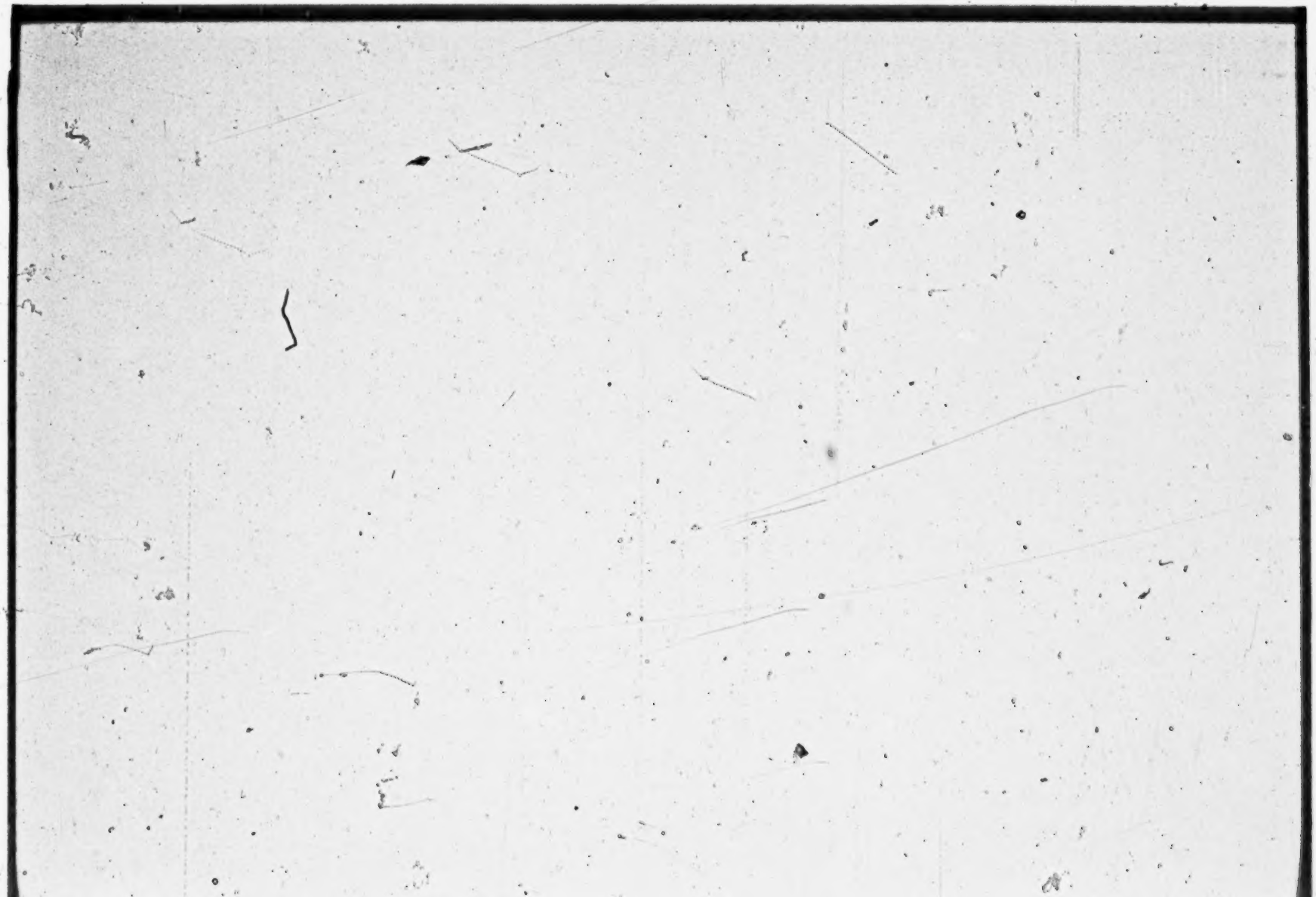
For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN

1730 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner



APPENDIX A

THE STATE OF OHIO,)
City of Columbus.) *1968 TERM*

Mahoning County Bar Association,
Relator,

To wit: Wednesday, December 18, 1968

No. DD No. 77

vs.

Frank R. Franko,
Respondent.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Upon consideration of the petition to vacate this Court's entry dated May 28, 1959, indefinitely suspending the respondent from the Practice of Law in Ohio and this Court's entry dated May 1, 1968, denying the respondent reinstatement, filed by respondent, it is ordered by this Court that this petition to vacate such orders be overruled. *I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ___ Page __*

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th *day of* December, *1968*

THOMAS L. STARTZMAN *Clerk.*

By /s/ Sam F. Adkins *Deputy.*

APPENDIX B

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	)	Case No. 4 (DD 77)
Petition of Frank R. Franko	)	
	)	FINDINGS OF FACT AND
	)	RECOMMENDATION OF THE BOARD ON PETITION FOR
	)	REINSTATEMENT FILED OCTOBER 11, 1966.
	)	

This matter came on to be considered before the duly appointed hearing panel of the Board of Commissioners on Grievances and Discipline on the "Petition for Reinstatement" filed on October 11, 1966, by Frank R. Franko in the above entitled case.

The Board, upon considering the evidence and brief filed by said Petitioner hereby makes the following findings of fact:

1. On May 28, 1958, an order was entered by the Supreme Court of Ohio in Journal No. 42, page 584 of the Records of that Court, suspending Frank R. Franko from further practice of law for an indefinite period, pursuant to an opinion of the Supreme Court of the same date reported in 168 Ohio St. 17.

2. On October 11, 1966, Frank R. Franko filed his petition for reinstatement to the practice of law, not having filed any prior petitions for such purpose.

3. On November 30, 1966, the hearing panel recommended that such petition be denied forthwith for insufficiency in form and substance. Such recommendation was denied by the Board of Commissioners on December 8, 1966, the entry also providing:

"It is further ordered that the Hearing Panel, heretofore named, conduct a public hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

"It is further ordered that this Board, being without jurisdiction or authority to 'vacate any order' of the Supreme Court of Ohio, as requested in the Petition for Reinstatement, no evidence bearing on this question will be taken or reported by the Hearing Panel."

4. Thereafter a hearing was held in Youngstown, Ohio on February 10, 1967. At such hearing Petitioner represented himself without the assistance of other counsel, and appeared as the only witness either in support of, or opposed to, his petition for reinstatement. The hearing was concluded in approximately ninety minutes, and is reported in a transcript of forty-five pages, exclusive of exhibits. The Petitioner filed eighteen copies of a ninety-four page brief on April 18, 1967. No other briefs were filed with the panel.

5. Petitioner's testimony in his own behalf included reading from, or paraphrasing, the statements contained in his petition. He further stated that he had "a minority viewpoint" on traffic enforcement when he was a judge, but contended some recent studies and articles, at least inferentially, supported his "minority" position.

The Petitioner then reviewed his efforts in 1959 to become mayor of Youngstown, and his various programs during his two-year term as mayor, together with later unsuccessful efforts to be reelected as mayor, or elected as congressman, during all of which time he claimed to have been subjected to unwarranted criticism by the local press.

The Petitioner stated that he had not been employed or sought employment since his failure to be reelected as mayor in 1961, but that he was living off his own and family investments. He testified that he was still interested in politics as a career, but was convinced that his indefinite suspension hampered such political career. He asserted that he did not believe he would ever care to practice in the courts, or desire to be a judge or run for judicial office, concluding with:

"There are times when I do blow my stack, and it wouldn't be advantageous for me to do so, and I just think the best thing for me to do is to stay out."

Aside from stating that he had never used the term "Judge" in any of his campaigns since his indefinite suspension, Petitioner made no reference in his testimony or brief to his present convictions, or to any change of mind, about any of the activities for which the Supreme

Court had criticized him at the time he was indefinitely suspended.

Petitioner testified that prior to his indefinite suspension he had an Ohio license as a public accountant (not a certified public accountant), which he had permitted to lapse, but that he had applied for and had such license reinstated approximately a year before the hearing. Petitioner had the educational requirements that would automatically grant him such a license but made the point that such licenses were to be issued only to persons of "good moral character." Petitioner also stated that the Internal Revenue Service had examined some of his returns for the years during which he was mayor, because of charges made by the local press as to his income, and had finally accepted his returns showing that his sole income was his salary as mayor.

6. The first sixty-two pages of Petitioner's brief are directed to the claim that the original hearing was void for lack of jurisdiction. Cited in support of such arguments are numerous references to the transcript of the original hearing relating to Petitioner's indefinite suspension, and other references to events in 1956 and 1957 that apparently were not a part of such transcript, none of which was in evidence before the Board. The balance of Petitioner's brief discusses the meaning of the phrases "public policy" and "public interest"; a review of Petitioner's career since his admission to the Bar; and a review of the criticism Petitioner has received from the local press, both prior and subsequent to his indefinite suspension.

CONCLUSION

Petitioner's petition for reinstatement, the evidence, and the brief in support thereof, do not establish by clear and convincing evidence that he has rehabilitated himself since his suspension and that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and do not establish that he is now a proper person to be readmitted to the Bar of Ohio.

RECOMMENDATION

Upon the foregoing findings and conclusion the Board recommends that the petition of Frank R. Franko for reinstatement be denied.

/s/ Karl H. Weaver
Chairman, Board of Commissioners
on Grievances and Discipline

/s/ William P. Radcliff
Secretary, Board of Commissioners
on Grievances and Discipline

APPENDIX C

THE STATE OF OHIO,)
City of Columbus.)

1968 TERM

In re: Reinstatement of)
Frank R. Franko:)
Mahoning County Bar Association,)
Relator,)
)
vs.)
Frank R. Franko,)
Respondent.)
)

To wit: Wednesday, May 1, 1968

No. DD No., 77

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

It is ordered by the Court that respondent's application for reinstatement be, and the same hereby is, denied.

I, THOMAS L. STARZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.__ Page __

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 1st *day of* May *1968.*

THOMAS L. STARTZMAN *Clerk,*
By /s/ Sam F. Adkins *Deputy.*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

FILED
JUL 2 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 120

FRANK R. FRANKO,
Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

JOHN H. RANZ,
MANCHESTER, BENNETT, POWERS & ULLMAN,
1106 Union National Bank Building,
Youngstown, Ohio 44503,
Counsel for Respondent.

EUGENE GRESSMAN,
1730 K Street N.W.
Washington, D. C. 20006,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Counterstatement of Questions Presented 1

Counterstatement of Case 1

Argument 4

1. The Chappel amendment did not violate the Due Process Clause of the Fourteenth Amendment as interpreted in *In Re Ruffalo*, 390 U. S. 544 4

2. The Supreme Court of Ohio would have disbarred petitioner and would have had a right to disbar petitioner without giving any consideration to the Chappel charge 4

3. Conducting petitioner's disbarment hearing under the new procedural rule adopted by the Supreme Court of Ohio did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment 6

4. The charges against petitioner had not been previously submitted to or considered by any court in Ohio 6

5. The disbarment of an elected state court judge for misconduct in office before the expiration of his term does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment 7

Conclusion 7

AUTHORITIES.

Cases.

Bar Assn. v. Franko, 168 Ohio St. 17 4

Ruffalo, In Re, 390 U. S. 544 ..... 4, 6

Constitution and Statutes.

Constitution of the United States, Fourteenth Amendment 4, 6, 7

Ohio General Code, Sec. 1707 2

Ohio Revised Code, Sec. 4507.15 1

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1399.

FRANK R. FRANKO,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

The only question presented by this record is whether an elected state court judge may be disbarred and removed from office before the end of his term. And this question is now moot.

COUNTERSTATEMENT OF CASE.

In 1957 a disbarment complaint was filed against petitioner by the Mahoning County Bar Association. It contained three counts. They were, in substance, as follows:

(1) For the purpose of promoting his political success he refused on many occasions to have convictions and guilty pleas noted on motorists' driving licenses, in direct violation of Ohio Revised Code Section 4507.15 and in

violation of Canon 34 which provides that a judge should administer justice unaffected by any private influences.

(2) While occupying the office of municipal judge, he ran for the office of prosecuting attorney and instead of complying with Canon 30 which provides that a judge should not become a candidate for any office other than a judicial office without first resigning, he continued in his office as a judge and used the power and prestige of his position to promote his campaign.

(3) In his capacity as a municipal judge, he voided parking violation charges involving the illegal parking of his own automobile, in violation of Canon 29 which provides that a judge should abstain from taking part in any judicial act in which he has a personal interest.

The charges were filed on May 27, 1957, and were heard on July 29, 30 and 31, 1957.

Prior to January 1, 1957, Ohio General Code Section 1707 provided that the Supreme Court, the Courts of Appeal and the Courts of Common Pleas should initiate disbarment proceedings when knowledge of professional misconduct came to their attention.

However, as of January 1, 1957, the Supreme Court of Ohio adopted an entirely new procedure for disciplining attorneys and judges. It created a Board of Commissioners on Grievances and Discipline and provided that after January 1, 1957, all proceedings for the disciplining of attorneys and judges should be heard by a three-member panel of that board and its recommendation then reviewed by the entire board of seventeen members and then their recommendation, in turn, reviewed and finally acted upon by the court, itself.

When the charges against petitioner came on for hearing before the three-member panel and before any evi-

dence was offered, counsel for Mahoning County Bar Association requested leave to amend the complaint by adding the following language concerning the Chappel incident (R.12):

> "Relator says that while respondent was occupying the Traffic Court Division of the Municipal Court during the month of June, 1956, one George Chappel was arrested and charged with reckless driving and the trial of said charge came before him as a municipal judge; that at and prior to the trial of said case, there had been much newspaper publicity with respect to whether or not one Sergeant Davis of the Youngstown Police Force was rightfully or wrongfully vacationing or residing in Florida while on the City's payroll; that for the ostensible purpose of obtaining expert testimony from said Sergeant Davis in connection with said case, but for the actual purpose of obtaining favorable newspaper publicity for himself in his campaign for the office of prosecuting attorney by publicizing Davis's absence and implying that it materially affected the administration of justice in his court in traffic cases, he subpoenaed the said Sergeant Davis and others (well knowing that the said Sergeant Davis was in Florida) and continued the case from time to time even though the said Chappel desired to plead guilty, and after obtaining such favorable publicity, he dismissed said charge against the said Chappel."

This request was granted.

Contrary to petitioner's assertion in this court, his acts of misconduct had never been the subject of a prior judicial consideration. Neither the judges of the Common Pleas Court of Mahoning County nor any other judges of the State of Ohio had ever previously considered these charges of misconduct.

ARGUMENT.

1. The Chappel amendment did not violate the Due Process Clause of the Fourteenth Amendment as interpreted in In Re Ruffalo, 390 U. S. 544.

This amendment was not made upon the basis of any testimony of petitioner. The taking of evidence had not even begun. He was not "trapped" into saying anything. The *Ruffalo* case involved the adding of a charge after the accused had testified and the additional charge was based wholly upon his testimony. This, the Court held, was not fair play.

In the present case petitioner had full knowledge of the additional charge before he testified. Proof of it had already been established when he took the witness stand. Whether the amendment should have been allowed was a matter which rested wholly within the discretion of the panel hearing the case. Petitioner, in his many appeals, has never claimed that the panel abused its discretion in this regard.

2. The Supreme Court of Ohio would have disbarred petitioner and would have had a right to disbar petitioner without giving any consideration to the Chappel charge.

The main reason for the Ohio Supreme Court's action was petitioner's failure to resign as a judge while seeking the office of Prosecuting Attorney and his *use of that office to promote his campaign.*

During the course of its opinion, it said (*Bar Assn. v. Franko,* 168 Ohio St. 17, at page 24):

> "It is clear from the undisputed facts that respondent did wilfully and knowingly violate Canon 30 of the Canons of Judicial Ethics adopted by this court in 1954. That canon specifically provides that,

'if a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.' "

And on page 35 the Court said:

"In clear terms, his decision to make a career of politics made while an assistant city attorney, his appeal to the cupidity and prejudices of the electorate in his campaign for municipal judge, his continual disruption, upon election, of the orderly administration of the business of the Youngstown Municipal Court in order to carry out his campaign promises, his blatant play for popularity in imposing extremely light sentences for traffic offenses, his abuse of the meaning of the term, 'judicial discretion,' to justify these and other acts which were also incidental to the carrying out of his campaign promises, his capitalization, by the use of the power and prestige of his judicial position, on every opportunity to seek favorable newspaper publicity and the continuous reference in his campaign literature for prosecuting attorney to his lenient policies as a judge compel the conclusion that his every act subsequent to his decision to make politics his career was in furtherance of this general political ambition, and that *his primary consideration as a judge of the Youngstown Municipal Court was the use of the power and prestige of that office to further and promote his own candidacy for any office for which he might later choose to run, whether judicial or nonjudicial.*" (Emphasis theirs.)

Thus, the Chappel incident was only one of the many instances of petitioner's misuse of his judicial office. The others amply supported and justified the Court's judgment and the decision would obviously have been the same even without the Chappel charge.

3. Conducting petitioner's disbarment hearing under the new procedural rule adopted by the Supreme Court of Ohio did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Canons of Judicial Ethics which petitioner violated were in effect long before his misconduct occurred. His conduct was condemned as being unprofessional and unethical at the time he acted. This is all that is necessary under the *Ruffalo* decision.

The creation of a Board of Commissioners on Grievances and Discipline to hear disbarment charges was simply a change in the procedure of disciplining attorneys and judges. Surely, neither an attorney nor anyone else has a constitutional right to be tried under the procedural remedies which were in existence at the time of his misconduct. Constitutional guaranties are concerned with substantive, not procedural law.

4. The charges against petitioner had not been previously submitted to or considered by any court in Ohio.

The claim of petitioner that his misconduct had been the subject of a prior judicial determination in 1956 is simply not true. And we challenge him to present to this Court any type of reliable evidence in support of this assertion.

5. The disbarment of an elected state court judge for misconduct in office before the expiration of his term does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Since Petitioner's term of office ended many years ago, this question is now moot. We shall, nevertheless, briefly discuss it.

A judge, as an attorney, must continuously respect and abide by the applicable rules and standards of his calling. If, after entering practice, it is shown that an attorney cannot resist the temptations incident to his profession, it is the duty of the bench and bar to disbar him and protect the public against his misconduct. When an attorney is elevated to the bench, he continues to be bound by the ethics of his profession and the bench and bar are under an even greater duty to protect the public from misconduct upon his part.

Surely, the Due Process Clause of our Constitution does not give a judge who has been guilty of misconduct in office the right to continue to the end of his term. Under Ohio law, to be eligible to seek and hold the office of a Judge, petitioner had to be, and had to remain, a qualified member of the legal profession of Ohio and his disbarment immediately disqualified him to continue in office.

CONCLUSION.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN H. RANZ,
MANCHESTER, BENNETT, POWERS & ULLMAN,
1106 Union National Bank Building,
Youngstown, Ohio 44503,
Counsel for Respondent.